

U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

Served: SEPTEMBER 14, 1990

FAA Order No. 90-24

In the Matter of:

MARCIA J. BAYER

Docket No. CP89S00310

DECISION AND ORDER

Respondent Marcia J. Bayer ("Respondent") has appealed from the oral initial decision issued by Administrative Law Judge E. Earl Thomas at the conclusion of the hearing held in this matter on December 6, 1989, in Fort Lauderdale, Florida.<sup>1/</sup> In his decision, the law judge apparently held that Respondent had violated section 107.20 of the Federal Aviation Regulations (FAR) (14 C.F.R. 107.20),<sup>2/</sup> as alleged in the complaint in this matter, and sustained the civil penalty sought in the complaint.

1/ A copy of the law judge's oral initial decision is attached.

2/ Section 107.20, 14 C.F.R. 107.20, provides:

Submission to screening.

No person may enter a sterile area without submitting to the screening of his or her person and property in accordance with the procedures being applied to control access to that area under section 108.9 or section 129.25 of this chapter.

Complainant Federal Aviation Administration (FAA) ("Complainant") alleged in the complaint that on August 28, 1988, Respondent approached the Eastern Airlines Security Checkpoint, Concourse D, Miami International Airport, as a visitor, and was informed that the concourse was closed for the night. It was alleged that, nonetheless, she proceeded to enter the sterile area without submitting to the screening process, thereby violating section 107.20 of the FAR. Complainant sought a \$550 civil penalty for this alleged violation.

The following facts are not in dispute. In August, 1988, Concourse D was under construction. The portion of the concourse which was furthest from the terminal had been completed, and aircraft were using the gate at the completed end of the concourse. To board aircraft, departing passengers were required to walk through the metal detector at the security checkpoint, go downstairs, and take a bus to the completed end of the concourse. During those times when aircraft were departing from Miami International Airport, security agents were posted at the base of the staircase and on the bus. It was intended that these security agents would ensure that no one handed any packages to the passengers after they had gone through the screening process and that the passengers did not enter the restricted air operations areas. After 10:00 pm, when there were no aircraft taking off from

Miami International Airport (and therefore, no crowds of departing passengers), security agents were not posted at the base of the stairs and the checkpoint staff was reduced to only one or two security agents.

On the night of August 28, 1988, Respondent approached the security checkpoint at Concourse D at Miami International Airport, where she was informed by Probidencia Ruiz, a security agent,<sup>3/</sup> that no one was permitted to go through the checkpoint and down the concourse. Respondent explained to Ruiz that she wanted to meet an incoming passenger at the gate because the passenger was ill, was carrying heavy bags, and had requested that Respondent meet her at the gate. Although there were no departing flights from Concourse D at that time of night, an incoming flight was expected. After Ruiz denied Respondent permission to pass through the security checkpoint, Respondent unsuccessfully attempted to obtain a pass from a ticket counter to authorize her to go to the gate. When Respondent returned to the security checkpoint without a pass, Ruiz informed Respondent that she could not help her. Despite the foregoing, Respondent entered the sterile area. A security officer later stopped Respondent and brought her back to the checkpoint.

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<sup>3/</sup> Ms. Ruiz testified that at the time, she was employed by Argon Bright Security as a "supervisor screener security."

The parties presented conflicting evidence regarding whether Respondent had walked through the metal detector and whether she had placed her purse on the conveyor belt of the x-ray machine. Respondent testified that she walked through the metal detector before entering the sterile area and that Ruiz, sitting at a desk which was away from the metal detector, did not see her go through the uprights. According to Ruiz, in contrast, Respondent walked around, not through, the metal detector. Ruiz testified that she was standing, as required, in front of the metal detector. Ruiz also testified that Respondent failed to place her purse on the conveyor belt of the x-ray machine, but Respondent testified that she was not even carrying a purse.

The law judge held that Respondent had entered the sterile area "without permission." He stated that the illness of Respondent's friend did not justify her actions and that the \$550 civil penalty was justified.

Respondent argues in her appeal brief, in essence, that the law judge's decision is not supported by the preponderance of the evidence, because, she claims, she did submit to the screening process. She also argues that she had inadequate notice of the allegations against her. Specifically, she alleges that it was stated in the complaint that her violation was entering a sterile area without submitting to the screening

process, while, at the hearing the issue was whether she had a pass to proceed to the gate. Finally, she argues that the \$550 civil penalty should be reduced in light of certain factors which, in her opinion, are mitigating.

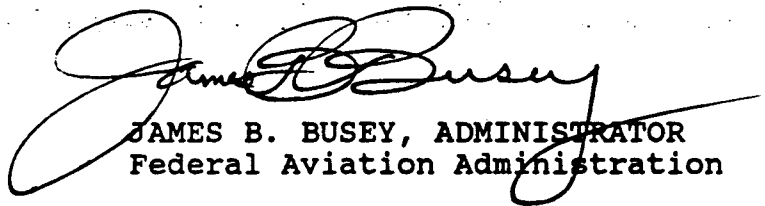
Section 107.20 provides:

No person may enter a sterile area without submitting to the screening of his or her person and property in accordance with the procedures being applied to control access to that area under section 108.9 or section 129.25 of this chapter.

14 C.F.R. 107.20. The law judge, unfortunately, failed to make the necessary credibility finding regarding whether Respondent had walked through or around the metal detector and, if Respondent was carrying a purse, whether she submitted her purse for screening on the x-ray machine conveyor belt. I find that it was error for the law judge to hold implicitly that Respondent violated section 107.20 without resolving these key factual issues. The law judge focused mistakenly on the issue of whether Respondent had a pass to authorize her to enter the sterile area. However, whether or not Respondent had a pass is not at issue in this case in which the only alleged violation is of section 107.20. The issue is whether or not Respondent submitted herself and her property, if any, to screening, and the law judge did not make the critical factual findings to determine whether Respondent followed the screening procedures in effect at the time.

Agency counsel argue in their reply brief that if, as Respondent testified, she walked through the metal detector while Ruiz was sitting at a desk away from the metal detector, then Respondent failed to submit to the screening procedures then in effect. I find that this argument is without merit. Under this theory, Respondent would be punished for the security agent's alleged failure to follow the procedural guidelines applicable only to the security personnel operating the metal detector and of which she had no reason to be aware.

Because a proper disposition of this case requires the resolution of certain factual issues prior to the determination of whether the alleged regulation was violated, as explained in this decision, I remand this case to the law judge to make the necessary factual findings and, in light of those findings, to reexamine the question of whether Respondent violated section 107.20 of the FAR as alleged.

  
JAMES B. BUSEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 13<sup>th</sup> day of September, 1990.